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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1150

ALLEN WILSON GILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11a) has not yet been reported. An opinion of the district court (Pet. App. 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1966. The petition for a writ of certiorari was filed on March 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction for possessing and transporting non-tax-paid liquor constituted double jeopardy.

STATEMENT

Petitioner was convicted in a non-jury trial in the Middle District of North Carolina on a two count indictment charging possession, concealing and transporting non-tax-paid liquor in violation of 26 U.S.C. 5601(a)(12) and 5604(a)(1). He was sentenced to imprisonment for twelve months and fined twelve hundred dollars.

Petitioner was apprehended on the Blue Ridge Parkway when he was observed traveling thereon while it was closed to the public because of snow and ice. At the time of his arrest a large quantity of non-tax-paid liquor was discovered in his automobile. A complaint was filed charging him with violations of Title 26 with respect to the liquor. He was also charged with two petty offenses—driving on a closed parkway and commercial hauling on the Blue Ridge Parkway, in violation of 36 C.F.R. 1.18 and 1.37. He was tried before a United States Commissioner for the petty offenses at the same time he was accorded a preliminary hearing on the liquor charges. He was convicted on the first petty offense charge, acquitted on the commercial hauling charge, and bound over for the grand jury complaint for liquor violations.

Before trial by the district court of the liquor charges, petitioner moved to dismiss the indictment

upon the ground that he had already been placed in jeopardy for the same offense when he was tried on the charge of commercial hauling. By agreement, ruling on the motion was deferred until the end of the trial, at which time it was overruled (Pet. App. 1a-2a). The court of appeals affirmed the conviction on the liquor charges (Pet. App. 11a-17a), finding that "the United States in this prosecution used simultaneous and not successive prosecutions, involving separate and distinguishable offenses" (Pet. App. 15a).

ARGUMENT

Petitioner's acquittal of the petty offense of commercial hauling on a parkway did not bar his trial for the felony of possessing and transporting non-tax-paid liquor; the elements of the offenses are markedly different. With respect to the commercial hauling charge, it made no difference what kind of goods petitioner was transporting; the elements of the offense were that he was (1) transporting movable goods; (2) on a parkway; (3) for a fee or profit. With respect to the liquor offenses, it made no difference where the goods were being possessed and transported or whether the transportation was for profit; the elements of the offense were that petitioner (1) possessed, concealed, or transported; (2) specific property, *i.e.*, distilled spirits; (3) on which the tax had not been paid or which did not have stamps. The subsequent trial for the felony charges thus involved no violation of the principle of double jeopardy. *Sealfon* v. *United States*, 332 U.S. 575; see, also, *United States* v. *Bayer*, 331 U.S. 532. Indeed, the elements of the

two charges are clearly so different (except for the fact of transportation which the Commissioner did find to have occurred as to the other petty offense) that there is no room for the principle of collateral estoppel recognized in the *Sealfon* decision.

Nor was there any violation of the policy against successive prosecutions for different acts arising out of the same transaction. The government brought at one time all charges arising out of petitioner's conduct on the parkway. Petitioner could not have been tried by a Commissioner without his affirmative election to be tried there, rather than in the district court.[1] Had petitioner elected to be tried on the petty offense charges in the district court, his trial on the petty charges could have been consolidated with the trial of the felony charges covered by the complaint. It was his decision, not the government's, which resulted in two trials.

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[1] 18 U.S.C. 3401(b) provides:

> (b) Any person charged with a petty offense may elect, however, to be tried in the district court of the United States. The commissioner shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant after being so apprised, signs a written consent to be tried before the commissioner.

We are lodging with the Clerk the document showing petitioner's election to be tried before a commissioner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1966.

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